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7 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
8 **OF THE STATE OF CALIFORNIA**

9 In the Matter of the Claim of:

10 **DAVID A. BERRY**

11 Claim No. G 542785

Proposed Decision
(Penal Code §§ 4900 *et seq.*)

12 A hearing on this claim was held September 19, 2005, in Sacramento, California, by Kyle
13 Hedum, Hearing Officer, who was assigned to hear this matter by the Executive Officer of the Victim
14 Compensation and Government Claims Board (Board).

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16 The claimant, David A. Berry (Berry), represented himself. Berry waived 15 days' notice of
17 the hearing pursuant to Penal Code section 4902.

18 The California Attorney General (AG) was represented by Deputy Attorney General Michael
19 Farrell. The AG waived 15 days' notice of the hearing pursuant to Penal Code section 4902.

20 **Evidence Submitted**

21 In opposition to the claim, the AG submitted the following documents into evidence:

- 22 Exhibit 1. Various Police and Investigative Reports
23 Exhibit 2. Criminal Complaint
24 Exhibit 3. Plea Transcript
25 Exhibit 4. Post-Sentencing Report
26 Exhibit 5. Abstract of Judgment
27 Exhibit 6. Shasta County District Attorney Press Release
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1 Mr. Berry did not submit any documentary evidence.

2 Evidence and Arguments Presented

3 On or about May 3, 2001, Berry was arrested and charged with the molestation of his
4 daughter, D.B., said molestation occurring on or about 1986. Section 803(g) of the Penal Code
5 allowed prosecution for sex-related child abuse where the prior limitation period had expired as long
6 as the prosecution began within one year of the victim's report to the police. On July 25, 2001, Berry
7 voluntary plead guilty to violations of California Penal Code sections 286(C) and 288(A). On August
8 23, 2001, Berry was sentenced to ten years state prison.

9 Subsequent to Berry's conviction, the United States Supreme Court, in *Stoegner v. California*
10 (2003) 539 U.S. 607, determined that Penal Code section 803, subdivision (g), violated the ex-post
11 facto clause when it was applied to revive previously time-barred prosecutions. Based on this
12 determination, the Shasta County District Attorney's office dismissed Berry's case, and Berry was
13 released from custody on September 4, 2003.

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15 Berry's claim was received by the Board on December 23, 2003, and was initially treated as a
16 government claim and not a claim pursuant to Penal Code section 4900 et seq. Additional
17 correspondence between the Board and Berry determined that Berry was indeed seeking
18 compensation pursuant to Penal Code section 4900 et seq. Therefore, Mr. Berry's claim is deemed
19 timely.
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21 At the hearing, Berry testified that he deserved compensation because he was prosecuted
22 and imprisoned for an offense that was later deemed to be time-barred due to the expiration of the
23 statute of limitations. He testified that prior to his imprisonment in 2001, he was employed by Rush
24 Industries as temporary help, making \$9.00 an hour with the promise of full-time status with a salary
25 of \$13.00 an hour. He stated he is currently unemployed and is not able to find a job because of his
26 past imprisonment for child molestation. He also admitted to prior prison commitments due to drug
27 usage.
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1 During the hearing, Berry admitted that he had various sexual contacts with his older
2 daughter, S.B., on a regular basis from childhood through her early adulthood. Part of the reason he
3 had sex with his oldest daughter is because his wife was unfaithful and she would send S.B. to Berry
4 to sexually satisfy him. The sexual contact included oral copulation, intercourse, and sodomy. Berry
5 stated that he became sexually obsessed with S.B., and that when S.B. began to physically and
6 emotionally pull away from him, he felt hurt.

7 Berry testified during the hearing that he allowed another daughter, D.B., to fondle his penis
8 while he and D.B. were in the bathtub together. He said that D.B. was about four or five years old
9 and he described the encounter as an innocent thing and that he was not sexually aroused by the
10 touching. He also testified that when D.B. was about nine years old, he was asleep in bed when D.B.
11 came into his bedroom and began to orally copulate him. He awoke and at first believed that S.B.
12 was orally copulating him. When he pulled back the cover and discovered D.B., he stated that he got
13 mad at his wife because he believed that she had sent D.B. into the bedroom to copulate him. He
14 testified that he believed that D.B. was supposed to "take over", since S.B. had begun pulling away
15 from him. Berry also testified that he did not feel the same way about D.B. as he did about S.B., and
16 he was concerned that he would hurt D.B.'s feelings when he stopped her from orally copulating him.
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18 At the request of law enforcement, S.B. agreed to call Berry and confront him with the child
19 abuse allegations. The conversation took place on March 18, 2001, and was tape-recorded by law
20 enforcement without Berry's knowledge. Berry apologized to S.B. for sodomizing her and for taking
21 her virginity, stating that S.B.'s mother had something to do with that. He also denied responsibility
22 because he was really "messed-up" on drugs at the time. When S.B. asked Berry if he is sorry for
23 sodomizing D.B. as a child, he replies, "Of course I am."
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25 Law enforcement made the same request of D.B., and this telephone conversation took place
26 on March 29, 2001. This conversation was also recorded by law enforcement without Berry's
27 knowledge. D.B. asked her father if he remembered molesting her. Berry's response was "I do
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1 remember some of it, but I don't remember it all." He again placed the blame for the molestation on
2 the fact that he was "screwed up on drugs part of that time."

3 In response to the AG's questions as to why he would apologize to D.B. if he did not molest
4 her, Berry stated that he did so because his mother told him that it would be good for D.B. to hear him
5 apologize, even if he did not molest her. He stated that he did not remember doing those things to
6 D.B. and that he was tricked into admitting that he sexually abused her. He also admitted that he was
7 so "messed-up" on drugs that he was unable to deny that the molestation occurred. Finally, he
8 testified that S.B. and D.B. had plotted together to convict him of these molestations.

9 Berry repeatedly emphasized that he was the victim of trickery and lies. He blamed his
10 mother for making him apologize to D.B. He blamed his wife for making him molest his daughters.
11 He was hurt when S.B. pulled away from him. He blamed S.B. and D.B. for scheming against him.
12 He blamed his defense attorney for making him plead guilty to molesting his daughter. He blames
13 the justice system for imprisoning him.
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15 Findings of Fact

16 1. It is found that Berry voluntary plead guilty to violations of California Penal Code sections
17 286(C) and 288(A) on July 25, 2001.

18 2. It is found that section 803(g) of the Penal Code allowed prosecution for sex-related child
19 abuse where the prior limitation period had expired as long as the prosecution began within one year
20 of the victim's report to the police
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22 2. It is found that subsequent to his conviction, the United States Supreme Court, in *Stoegner*
23 *v. California* 2003) 539 U.S. 607, determined that Penal Code section 803, subdivision (g), violated
24 the ex-post facto clause when it was applied to revive previously time-barred prosecutions
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26 3. It is found that Berry was released from custody on September 4, 2003.

27 4. It is found that Berry admitted during the hearing that he sexually abused S.B. on or about
28 1986 and that this abuse continued for a period of years.
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1 5. It is found that Berry admitted during the hearing to being fondled and orally copulated by
2 D.B. on or about 1986.

3 6. It is found that Berry did not deny that he sodomized D.B.; instead, he stated that he has no
4 memory of sodomizing D.B.

5 7. It is found that Berry's testimony was vague and evasive regarding the molestation of D.B.
6 and is thus deemed not credible.

7 8. Berry was employed prior to his conviction on July 25, 2001.

8 **Determination of Issues**

9 Penal Code section 4903 establishes the requirements for a successful claim for an
10 erroneously convicted felon. The claimant must prove: 1) that the crime with which he was charged
11 was either not committed at all, or, if committed, was not committed by him; 2) that he did not by any
12 act or omission on his part, either intentionally or negligently, contribute to the bringing about of the
13 arrest or conviction for the crime; and 3) that he sustained a pecuniary injury through his erroneous
14 conviction and imprisonment. (Pen. Code, § 4903.) If the claimant meets his burden of proof, the
15 Board shall recommend to the legislature that an appropriation of \$100.00 per day of incarceration be
16 made for the claimant. (Pen. Code, § 4904.)
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18 The claimant has the burden of proving his innocence by a preponderance of the evidence.
19 (*Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7.)
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21 In reaching its determination of the merits of the claim, the Board may consider the following,
22 but the following will not be deemed sufficient evidence to warrant the Board's recommendation that
23 the claimant be indemnified in the absence of substantial independent corroborating evidence that
24 the claimant is innocent of the crime charged: (1) claimant's mere denial of commission of the crime
25 for which he was convicted; (2) reversal of the judgment of conviction on appeal; (3) acquittal of
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1 claimant on retrial; or (4) the failure of the prosecuting authority to retry claimant for the crime. (Cal.
2 Code Regs., tit. 2, § 641.¹)

3 Testimony of witnesses claimant had an opportunity to cross-examine, and evidence to which
4 claimant had an opportunity to object, admitted in prior proceedings relating to the claimant and the
5 crime with which he was charged, may be considered by the Board as substantive evidence. The
6 Board may also consider any information that it may deem relevant to the issue before it. (Reg., §
7 641.)

8 Berry claims that he is entitled to compensation because his convictions were later dismissed
9 by the Shasta County District Attorney due to the ruling by the United States Supreme Court. Berry
10 presented no evidence that he did not commit the crimes for which he was convicted. Instead, he
11 admitted at the hearing to being fondled and orally copulated by D.B. He also testified at the hearing
12 that while he has no memory of sodomizing D.B., he couldn't state for a certainty that he did not
13 sodomize her.
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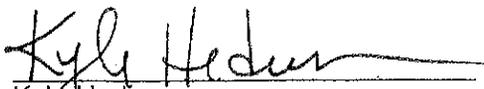
15 Berry contributed to his arrest by admitting to S.B. and D.B., in recorded conversations, that
16 he was sorry for sexually molesting them. Berry contributed to his conviction by voluntary pleading
17 guilty to violations of California Penal Code sections 286(C) and 288(A).
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19 After careful evaluation of all of the evidence, there is insufficient evidence that Mr. Berry did
20 not violate California Penal Code sections 286(C) and 288(A) and that Mr. Berry did not, either
21 intentionally or negligently, contribute to his arrest or conviction for those offenses.
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23 Order

24 Mr. Berry's claim under Penal Code sections 4900 *et seq.* is denied.

25 Date: September 21, 2005

26 
27 Kyle Hedum
28 Hearing Officer

29 ¹ All citations to regulations are to California Code of Regulations, title 2.